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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. DEMARCO MARQUISE ROWE, Defendant and Appellant.	C085815 (Super. Ct. No. CRF1719052)

Defendant Demarco Marquise Rowe and his codefendant (Austin Hughes, not a party to this appeal) physically attacked a man and stole his backpack and cell phone. A jury found defendant guilty of robbery and battery with serious personal injury. The trial court imposed the sentences for the robbery and battery counts to run concurrently without addressing the possibility of a stay.

On appeal, defendant contends the sentence for battery must be stayed pursuant to Penal Code section 654[1] because it was part of the same course of conduct as the robbery. He adds that we must remand the case to allow the trial court to exercise its discretion to strike his prior serious felony conviction. We disagree with the first claim but shall remand as requested.

FACTUAL AND PROCEDURAL BACKGROUND

On April 20, 2017, at approximately 7:00 p.m., victim C.C. was riding his bicycle home from class, carrying a backpack. A car approached him from behind and forced him to stop. He testified that the car's occupants were yelling something at him, but he could not hear clearly because he was listening to headphones. He got off his bicycle because he thought the occupants might have been yelling that he had dropped something.

Erika Vizcara was driving defendant, Hughes, and Vincente McEvoy when she tried to make a U-turn. She recalled C.C. yelled out "learn how to drive, bitch." Vizcara and C.C. argued. According to McEvoy, "I guess we got close to the bike or someone hit him. I don't know."

Hughes and defendant got out of the car and confronted C.C. Vizcara heard Hughes tell C.C. not to talk to her that way. C.C. disagreed Hughes said anything to him and asserted defendant and Hughes rushed toward him and punched him in his face, side, and back over 10 times. McEvoy did not recall any conversation between defendant, Hughes, and C.C., he only remembered Hughes and defendant "[b]eat him [C.C.] up, take [*sic*] his stuff." As Hughes and defendant continued to hit C.C., defendant took C.C.'s backpack and demanded C.C. take off his pants. C.C. did not take off his pants, but he

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[1] Further undesignated statutory references are to the Penal Code.

handed one of the men his cell phone. The men swore at him and then returned to their car. As they drove away, C.C. heard Vizcara yell at him, "You deserve it."

A jury found defendant guilty of second degree robbery (§§ 211/212.5, subd. (c); count 1) and battery with serious personal injury (§ 243, subd. (d); count 2). In a bifurcated trial, the trial court found true an allegation defendant had been previously convicted of a strike (§ 667, subd. (c) & (e)(1)) and a prior serious felony, arising from that same prior strike conviction (§ 667, subd. (a)(1)).

The trial court selected count 1 as the principal offense and sentenced defendant to the middle term of three years in prison, doubled to six years due to his prior strike conviction, and three years in prison for count 2, doubled to six years to run concurrently, plus five years consecutive for the prior serious felony.

DISCUSSION

I

Section 654

Defendant contends his sentence for battery with serious bodily injury must be stayed under section 654 because the battery occurred during a single course of conduct and shared a criminal purpose with the robbery. He argues his act of committing the battery was merely incidental to the robbery because both acts arose from the criminal objective: taking C.C.'s property. We disagree.

Section 654, subdivision (a) provides in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

Section 654 applies not only where there was one act in the ordinary sense, but also where there was a course of conduct that violated more than one statute but nevertheless constituted an indivisible transaction. (*People v. Perez* (1979) 23 Cal.3d 545, 551.) However, if the evidence discloses that a defendant entertained multiple

criminal objectives, he may be punished for the independent violations committed in pursuit of each objective. (*Ibid*.) " 'It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible.' " (*People v. Hicks* (1993) 6 Cal.4th 784, 789.)

Here, although the trial court made no explicit findings (as it was not asked to apply section 654), "implicit in the trial court's concurrent sentencing order is that defendant entertained separate intentions . . . ." (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1565.) Therefore, we assume the court implicitly found support for its failure to apply section 654, and we look to the record to support those findings.

" 'The defendant's intent and objective are factual questions for the trial court.' " (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) Trial courts have broad latitude to determine whether a defendant harbored one or more objectives, and we uphold their findings on appeal if there is any substantial evidence in the record to support them. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.) " 'We review the court's determination of [a defendant's] "separate intents" for sufficient evidence in a light most favorable to the judgment, and presume in support of the court's conclusion the existence of every fact the trier of fact could reasonably deduce from the evidence. [Citation.]' [Citation.]" (*People v. Andra* (2007) 156 Cal.App.4th 638, 640-641.)

Here, there is substantial evidence supporting the trial court's implied finding defendant harbored multiple criminal intents and objectives during the altercation. Vizcara and McEvoy testified the incident began with an unfriendly verbal exchange between Vizcara and C.C. It then escalated when defendant and Hughes got involved. There is substantial evidence Hughes and defendant initially began punching C.C. in response to that exchange. Then, at some point during the battery on C.C., defendants developed the subsequent and different intent to rob him. We disagree with defendant's argument that the evidence shows that physical attack was *merely* a means to accomplish the robbery. There is substantial evidence the battery began as punishment or revenge for

C.C.'s perceived conduct toward Vizcara and morphed into a robbery. Because there is substantial evidence supporting the trial court's implied finding that defendant harbored separate criminal intents and objectives during the attack, multiple punishments were permissible.

II

Senate Bill No. 1393

Defendant filed a supplemental brief contending that Senate Bill No. 1393 (2017-2018 Reg. Sess.) applies retroactively to his case. The People properly concede the matter.

The Governor signed Senate Bill No. 1393, which, effective January 1, 2019, amends sections 667, subdivision (a) and 1385, subdivision (b) to allow a trial court to exercise its discretion to strike or dismiss a prior serious felony allegation for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) Under the pre-2019 versions of these statutes, the court was required to impose a five-year consecutive term for "any person convicted of a serious felony who previously has been convicted of a serious felony" (§ 667, subd. (a)), and the court had no discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (§ 1385, subd. (b).)

The statutory changes of Senate Bill No. 1393 apply retroactively to any case that is not final on January 1, 2019, under the rule of *In re Estrada* (1965) 63 Cal.2d 740. "The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not." (*People v. Conley* (2016) 63 Cal.4th 646, 657.)

The same inference of retroactivity applies when an amendment ameliorates the possible punishment. (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 308.) When a statutory amendment " 'vests in the trial court discretion to impose either the same penalty as under the former law or a lesser penalty,' " there is "an inference that the

Legislature intended retroactive application 'because the Legislature has determined that the former penalty provisions may have been too severe in some cases and that the sentencing judge should be given wider latitude in tailoring the sentence to fit the particular circumstances.' " (*Ibid.*, quoting *People v. Francis* (1969) 71 Cal.2d 66, 76.)

Under the *Estrada* rule, as applied in *Francis* and *Lara*, we infer as a matter of statutory construction, that the Legislature intended Senate Bill No.1393 to apply to all cases not yet final on January 1, 2019. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) Accordingly, we remand the matter to the trial court for the limited purpose of the exercise of its discretion as to whether to strike the five-year enhancement.

DISPOSITION

The judgment is affirmed. The matter is remanded to the trial court for the limited purpose of the exercise of discretion regarding the section 667, subdivision (a) enhancement.

/s/
Duarte, J.

We concur:

/s/
Blease, Acting P. J.

/s/
Hull, J.